COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP1677 **Cir. Ct. No. 2001CV191**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

RALPH SCHMIDT AND KARLINE SCHMIDT,

PLAINTIFFS-APPELLANTS,

AUGUST C. HEEG, JR., AND JOANNE HEEG,

PLAINTIFFS,

V.

NORTHERN STATES POWER COMPANY D/B/A XCEL ENERGY, ST. PAUL FIRE & MARINE INSURANCE COMPANY AND ASSOCIATED ELECTRIC & GAS INSURANCE SERVICES LIMITED D/B/A AEGIS INSURANCE SERVICES, INC., AND/OR AEGIS SECURITY INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Clark County: JON M. COUNSELL, Judge. *Reversed and cause remanded.*

Before Lundsten, P.J., Vergeront and Deininger, JJ.

¶1 DEININGER, J. Ralph and Karline Schmidt appeal a judgment dismissing their claims against Northern States Power Company. They claim that the circuit court erred in determining on summary judgment that their claims were barred by the six-year statute of limitations, WIS. STAT. § 893.52 (2003-2004).[1] We conclude the facts of this case do not present a situation where uncontroverted evidentiary facts can lead to only one conclusion regarding whether the statute of limitations bars the plaintiffs' claims, and, thus, neither Northern States nor the Schmidts can prevail on the limitations issue as a matter of law. We also conclude that the Schmidts' claims are not barred by the filed rate doctrine, as Northern States contends. Accordingly, we reverse and remand for further proceedings on the Schmidts' claims against Northern States.

BACKGROUND

¶2 Because this case comes to us on summary judgment, the following facts are taken from the parties' submissions on summary judgment. Some historical facts appear to be disputed, but more significant is the fact that the parties plainly dispute the inferences that may reasonably be drawn from the summary judgment record.

¶3 Ralph and Karline Schmidt are dairy farmers. In 1978, they purchased a farm in Clark County, which they continued to operate at the time they filed this action. Soon after they purchased the farm, they experienced problems with their dairy herd. New, young, healthy dairy animals also developed problems similar to those exhibited in the existing herd. These problems included

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

mastitis, udder deformities, problems milking out, bad knees, low feed consumption, poor breeding, kicking and switching tails, unusually high mortality, and, as a consequence, poor milk production.

¶4 Some of the dairy-related experts the Schmidts consulted opined that stray voltage may be the cause of the problems with their cows. Specifically, a consultant from Dairy Services, Inc., Ostaf Hanusczek, whom the Schmidts retained to check their milking system, told them in 1992 that they had "some current problems." However, he apparently expressed no opinion as to the source of any stray voltage.

¶5 The Schmidts first requested stray voltage testing from Northern States in 1992, and the utility sent its representative, Bob Twesme, to investigate. Twesme reported to the Schmidts that they did not have a stray voltage problem, allegedly explaining to them that, because they used plastic water lines, it was impossible for them to have stray voltage that affected their cows. In 1993, the Schmidts had an electrician named Van Ert do some electrical work at their farm. Van Ert told the Schmidts that stray voltage was present on the farm and that it "would be from N[orthern States]." Van Ert also reported to Northern States that the transformer serving the Schmidt farm "was [not] large enough" and that the Schmidts' problems had begun in September 1992 "when neutral fell to ground."

¶6 Northern States followed up by conducting additional stray voltage tests on the farm in July and September 1993. During this period, the utility increased the size of the transformer serving the Schmidts' farm. A Northern States engineer averred that, beginning with the 1992 test and in subsequent testing conducted by Northern States in 1993, 1998 and 2000, "[a]t no time did [Northern States] measure steady state contact voltage above the 'level of concern'

expressed by the [Wisconsin Public Service Commission (PSC)] and incorporated in N[orthern States]' Tariff during normal farm operations." One test in September 1993 did show a "temporary" voltage above the "level of concern," but that occurred only when the Northern States investigator "temporarily bonded the Schmidts' grounding system to the barn stanchion steel" in order to simulate hypothetical conditions. Following the 1993 tests, Northern States "replaced some primary neutral conductor, improved some grounding, and assisted the Schmidts in installing an equal potential plane (EPP) in the barn," which steps were "implemented to eliminate the possibility of exceeding the 'level of concern' had the farmer intentionally or inadvertently bonded his electrical grounding system to the barn stanchion steel."

¶7 After Northern States improved the grounding and primary neutral conductor and installed the EPP, the health of the herd temporarily improved. In about six months to a year, however, the herd's problems began to reappear. By 1997, the Schmidts were again "having a real difficulty" with their herd. Also during that year, Northern States installed new "neutral and hot" lines, which according to Ralph Schmidt, is when "it really went bad," and that "bad went to worst." Because they had not seen any permanent improvement in their cows' health and performance, the Schmidts contacted Northern States again in 1998 to request additional testing. The utility performed additional tests and again determined that the steady state cow contact voltages on the farm were significantly less than the PSC "level of concern." In early 1999, at the Schmidts' request and at their expense, Northern States installed an "isolator." The isolator produced "drastic improvement for a couple months."

¶8 The Schmidts also pursued various non-electrical measures to remedy the problems their herd was experiencing. These included altering the

feed for the cows, using rubber cow mats and placing rubber tires in the bunks. The Schmidts also purchased twenty acres of land located about two miles from their farm and transferred their "dry cows" to this land "to freshen." The parcel has no electrical service. Karline Schmidt testified in her deposition that the health of the cows improved at the new location.

¶9 In August 2001, the Schmidts hired William Schmidt of Schmidt Electric to conduct stray voltage testing on the farm.[2] The electrician issued a written report in which he stated his conclusion that "the levels of stray voltage [on the farm were] substantial enough to create the symptoms seen in the Schmidt's dairy herd." He expressed an opinion that much higher levels of stray voltage were present at this location than he was able to detect during the limited testing period. Specifically, he criticized the isolator installed by Northern States and added that the disconnected wire he found in the vicinity of the farm could have contributed to much higher levels of stray voltage during windy conditions. With respect to possible remedies for on-farm sources of stray voltage, electrician Schmidt concluded that "[t]here is little if anything, that can be done on the farm to eliminate the major cause of this stray voltage. It should be removed at the source which is the utility neutral system."

¶10 Four months later, in November 2001, the Schmidts filed this lawsuit against Northern States.[3] In their complaint, the Schmidts alleged claims

[2] We have located nothing in the record indicating that William Schmidt was related in any way to plaintiffs Ralph and Karline Schmidt.

[3] The case is captioned ***Ralph and Karline Schmidt and August C. Heeg, Jr., and Joanne Heeg v. Northern States Power Company*** and two insurers. The Schmidts and the Heegs owned separate dairy farms about thirty miles apart. They jointly commenced this action against Northern States Power Company, the utility that supplied electricity to both farms, and its insurers. The plaintiffs justified the joint action by asserting that their herds exhibited similar (continued)

of negligence, strict liability, nuisance, violations of WIS. STAT. chs. 196 and 197 and WIS. ADMIN. CODE ch. PSC 114, and punitive damages. Northern States denied all material allegations and pled numerous affirmative defenses. The utility also moved for summary judgment on statute of limitations grounds and on the basis of the filed rate doctrine.

¶11 The circuit court agreed with Northern States that the Schmidts' action was barred by the six-year statute of limitations. The circuit court determined, on the basis of Ralph and Karline Schmidt's depositions, that they knew in 1993 that stray voltage was present on their farm and that it was caused by Northern States. The court explained:

> What is probably most important to the court's decision on the issue of summary judgment regarding the statute of limitations is the Schmidts' testimony that there was stray voltage affecting their herd as of 1993. Mr. Schmidt in his deposition testified that an electrician and a veterinarian had told him that they had stray voltage problems with their herd and that that stray voltage was caused by the defendant.

The court also concluded that, even if the plaintiffs' action had been timely filed, their claims are barred by the filed rate doctrine. The Schmidts appeal the judgment dismissing their action.

---

symptoms that they attributed to the same phenomenon, stray voltage caused by the utility. They also noted that the same expert had assessed the resulting economic damages each couple had suffered. Northern States opposed the joinder, arguing that stray voltage can be caused by a variety of on- and off-farm sources and a separate causation determination must be made with respect to each farm. The circuit court agreed with the utility and ordered the plaintiffs to file separate complaints. The Heegs' action was also subsequently dismissed on statute of limitations grounds, and they have also appealed. We dispose of the Heegs' appeal in ***Schmidt v. Northern States Power Co. (Heeg)***, No. 2005AP862, unpublished slip op. (WI App Sept. 28, 2006). Finally, we note that we refer in this opinion to the utility and its insurers, collectively, as Northern States.

ANALYSIS

Statute of Limitations[4]

¶12 The Schmidts claim the circuit court erred by concluding, on the basis of the summary judgment submissions, that they knew or, through the exercise of reasonable diligence, should have known of their stray voltage claim against Northern States Power Company more than six years before they brought this action. We review an order granting summary judgment de novo, applying the same standards as the trial court. *See* ***Voss v. City of Middleton***, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). Summary judgment is proper when the pleadings and evidentiary submissions show no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See* ***Maynard v. Port Publ'ns, Inc.***, 98 Wis. 2d 555, 558, 297 N.W.2d 500 (1980).

¶13 If we were to conclude that no dispute of material fact exists on the record before us, and that not Northern States but the Schmidts, although not the moving party, should prevail on the statute of limitations issue as a matter of law, we would reverse and so order. *See* WIS. STAT. § 802.08(6). We will also set aside an order granting summary judgment, however, if we conclude that material facts, or the competing reasonable inferences from those facts, preclude a determination of the issue on summary judgment. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980) ("If the material presented on the motion is

[4] The Schmidts are represented in this case by the same counsel who represent the plaintiffs-appellants, Joanne and August Heeg, in ***Schmidt v. Northern States Power Co. (Heeg)***, No. 2005AP862, unpublished slip op. (WI App Sept. 28, 2006) (see footnote 3). Northern States also has the same counsel here as in the companion case. Not surprisingly, most of the parties' arguments in this appeal are the same as those advanced in ***Heeg***. For this reason, our discussion of the law pertaining to Northern States' defenses based on the statute of limitations and the filed rate doctrine closely parallels our discussion of these issues in ***Heeg***.

subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.").

¶14 Stated differently, we must reverse a summary judgment order and remand for further proceedings when we conclude that the record does not permit a determination in favor of either party as a matter of law and the issue in question is one that only a fact finder can resolve. *See* ***Ford Farms, Ltd. v. Wisconsin Elec. Power Co.***, 145 Wis. 2d 650, 659, 430 N.W.2d 94 (Ct. App. 1988). We conclude that is the case on the record before us.

¶15 WISCONSIN STAT. § 893.52 imposes a six-year time limitation for commencing tort actions like this one, which seek damages for injuries to personal property.[5] *See* ***Allen v. Wisconsin Pub. Serv. Corp.***, 2005 WI App 40, ¶8, 279 Wis. 2d 488, 694 N.W.2d 420. As with other tort claims, we must apply the "discovery rule" in order to determine when the limitation period began to run on the Schmidts' stray voltage claims against Northern States. *See* ***id.***

> Under [the discovery] rule, a plaintiff's claim accrues when the plaintiff objectively knows, or with reasonable exercise of care should have known, the cause of the injury and the defendant's part in that cause. Furthermore, "[a] plaintiff can rely on the discovery rule only if he or she has exercised reasonable diligence." Reasonable diligence means "such diligence as the great majority of persons would use in the same or similar circumstances" to discover the cause of the injury.

Id. (citations omitted).

[5] WISCONSIN STAT. § 893.52 provides as follows: "An action, not arising on contract, to recover damages for an injury to real or personal property shall be commenced within 6 years after the cause of action accrues or be barred, except in the case where a different period is expressly prescribed."

¶16 "[D]iscovery does not occur until there is information available to the claimant of the nature of [the] injury, the cause of [the] injury, and the defendant's part in that cause." ***Borello v. United States Oil Co.***, 130 Wis. 2d 397, 414, 388 N.W.2d 140 (1986). As we explained in ***Allen***, 279 Wis. 2d 488, ¶16, under the supreme court's analysis in ***Kolpin v. Pioneer Power & Light Co., Inc***., 162 Wis. 2d 1, 26-27, 469 N.W.2d 595 (1991), the statute of limitations begins to run on a stray voltage claim when the plaintiff farmer knows or should have known both that stray voltage is present on the farm and that its cause is attributable to the defendant utility.

¶17 The question of when discovery occurred, that is, determining the point at which a plaintiff knew or should have known of the existence of a claim against the defendant, will sometimes present a question of law, and on other occasions, one of fact. The supreme court noted in ***Kolpin*** that, when a dispute concerns the construction and application of a statute of limitations, a question of law is presented, which a reviewing court may decide de novo. *See* ***id***. at 18.[6]

¶18 In many cases, however, the record on summary judgment will not be sufficient to determine as a matter of law the point at which the plaintiff discovered or reasonably should have discovered the existence of a claim against the defendant. That is what we concluded to be true in ***Ford Farms***. We noted

[6] The court concluded in ***Kolpin v. Pioneer Power & Light Co., Inc***., 162 Wis. 2d 1, 469 N.W.2d 595 (1991), that "the jury's answer to the discovery question should be changed as a matter of law," ***id***. at 25, because, on the evidence produced at trial, "the jury's answer … could have only been" that discovery of the plaintiffs' claim occurred within six years of their filing suit, ***id***. at 27. *See also* ***Allen v. Wisconsin Pub. Serv. Corp.***, 2005 WI App 40, ¶16, 279 Wis. 2d 488, 694 N.W.2d 420 (concluding, "as a matter of law, on the undisputed facts of this case …," that the plaintiff "exercised reasonable diligence to investigate the source of his herd's problems," and, thus, discovery of the claim did not occur until within six years of the filing of the action).

there that all doubts regarding whether a factual issue exists must be resolved against the party moving for summary judgment, which in that case, as here, was the defendant utility. ***Ford Farms***, 145 Wis. 2d at 655. We specifically pointed out that, if the summary judgment submissions "allow for different interpretations or reasonable persons might disagree as to their significance, it is improper to grant summary judgment." ***Id***. (citing ***Grams v. Boss***, 97 Wis. 2d at 339).

¶19 Because the facts relevant to the discovery issue in ***Ford*** were not "uncontroverted," we concluded that a "significant jury question may be presented … as to when Ford Farms knew or should have known the nature and cause of its alleged injury." ***Id***. at 659. Accordingly, we reversed the circuit court's summary judgment dismissing the plaintiff's claims and remanded for further proceedings on those claims. ***Id***. We reach the same conclusion and result on the record before us now.[7]

¶20 Although the law applicable to both the ***Heeg*** case and this one is the same, the facts of the two cases of course differ. The facts in this case arguably provide greater support than those in ***Heeg*** for the circuit court's conclusion that Northern States is entitled to have the Schmidts' action dismissed on statute-of-limitations grounds. The supreme court's observation in ***Kolpin***, 162 Wis. 2d 1 (citation omitted), however, applies equally well here as it did in ***Heeg***:

[7] Recently, we have again acknowledged that determining when a plaintiff discovered the nature and source of an injury and whether he or she exercised reasonable diligence in so doing are often questions appropriately delegated to a fact finder. Specifically, relying on an alternative analysis in ***Allen***, 279 Wis. 2d 488, ¶17, we affirmed a jury verdict that we concluded had necessarily included a determination by jurors that the plaintiff farmers had exercised reasonable diligence in attempting to discover the nature and source of the problems they experienced with their herd. *See* ***Gumz v. Northern States Power Co.***, 2006 WI App 165, ¶¶12-13, ___ Wis. 2d ___, ___ N.W.2d ___.

> This case does not involve the typical tort claim, *e.g.*, an automobile accident case, where the cause and effect of a plaintiff's injuries are readily apparent. Because of the difficulties in pinpointing the exact source of stray voltage, it is difficult for a plaintiff to determine the relationship between the stray voltage and its source. The source could be the plaintiff's own electrical wiring, a defect in the milking parlor, or an improperly grounded line leading to the barn. But in this case, once the Kolpins found the solution to their problem, they were able to trace it to the cause of their problem—Pioneer's distribution system. The "discovery" was more of a process of elimination of possible causes rather than a process of determination of the cause.

Id. at 26-27. We relied on the foregoing language in ***Allen***, 279 Wis. 2d 488, where we noted as well that the defendant utility "went to the farm three times and told Allen there was no problem." ***Id.***, ¶¶15-16. We concluded in ***Allen*** that the plaintiff had exercised reasonable diligence, as a matter of law, and that he only "objectively discovered the relationship between the stray voltage" on the farm and the utility, after having gone through "a reasonable process of eliminating other possible causes." ***Id.***

¶21 Portions of Ralph and Karline Schmidts' depositions could support a finding that the Schmidts knew or should have known of their claims against Northern States in 1993, which was when an electrician (Van Ert) told them that they had a stray voltage problem and that it was caused by Northern States. We cannot conclude, however, that that is the only reasonable conclusion that may be drawn from the record on summary judgment. Although the plaintiffs were informed by Van Ert in 1993 that they had stray voltage on their farm caused by Northern States, that fact must be weighed against the further fact that, based on its own testing, the utility informed the Schmidts that no voltage or current was present on their farm that exceeded the PSC's "level of concern." Furthermore, after conducting additional testing to explore "hypothetical" circumstances,

Northern States implemented several corrective measures that, at least temporarily, alleviated the problems the Schmidts' had been experiencing with their dairy herd. A fact finder could reasonably infer from these facts that the Schmidts did not know or reasonably should have known in 1993 that Northern States was the source of the ongoing problems their cows experienced.

¶22 Accordingly, we cannot conclude as a matter of law that the Schmidts knew or should have known of their claim against Northern States after electrician Van Ert's reported conclusions in 1993. Northern States denied responsibility, while at the same time taking certain apparently successful measures to remedy the Schmidts' problems. Both before and after 1993, the Schmidts pursued various electrical and non-electrical solutions to the problems with their herd, and none produced lasting improvement in the health or productivity of their cows. A fact finder could reasonably determine on the present record that it was not until much later, perhaps as late as 2001 when they moved their dry cows to another parcel and obtained a new investigative report from Schmidt Electric, that they actually knew, or reasonably should have known, that stray voltage caused by Northern States was the true source of their injury.

¶23 The same is true regarding whether the Schmidts were "reasonably diligent" in attempting to discover the nature and source of their injury. Ordinarily, whether a party has exercised reasonable diligence in discovering the existence of an actionable claim is a question of fact. *See* ***Spitler v. Dean***, 148 Wis. 2d 630, 638, 436 N.W.2d 308 (1989). Moreover, "reasonable diligence … means such diligence as the great majority of persons would use in the same or similar circumstances." ***Id.*** The present record is simply not unequivocal regarding whether the Schmidts met this standard. Thus, whether the Schmidts

exercised reasonable diligence in attempting to discover the nature and source of their injury cannot be determined as a matter of law.

¶24 In sum, we conclude that, on the record before us, neither party may prevail on the discovery issue as a matter of law. Even if it is reasonable to infer that the Schmidts knew or should have known prior to 1995 that stray voltage was present on their farm, that does not necessarily mean that they also should have known that Northern States was the cause of the problem.[8] This is especially so given that Northern States consistently maintained, as did the utilities in ***Kolpin*** and ***Allen***, that its testing at the Schmidt farm showed no stray voltage problem attributable to the utility. Because we must resolve all doubts regarding the reasonable inferences to be drawn from the parties' evidentiary submissions on summary judgment against Northern States, *see* ***Ford Farms***, 145 Wis. 2d at 655, and because the factual inferences "regarding discovery are not uncontroverted," *see* ***id***. at 659, we reverse the circuit court's grant of summary judgment and remand for further proceedings in that court.[9]

[8] As the supreme court explained in ***Kolpin***, 162 Wis. 2d at 10, "[Stray voltage] is a natural phenomenon and is present on all active distribution systems. It can come from a variety of different sources, both on and off the farm." Later in its opinion, the court noted that the source of stray voltage "could be the plaintiff's own electrical wiring, a defect in the milking parlor, or an improperly grounded line leading to the barn." ***Id***. at 27.

[9] Because we reverse on the basis of the discovery rule, we do not address two other theories the Schmidts advance for reversal, continuing nuisance and the continuum of negligent acts doctrine. *See* ***Ford Farms, Ltd. v. Wisconsin Elec. Power Co.***, 145 Wis. 2d 650, 659-60, 430 N.W.2d 94 (Ct. App. 1988).

Estoppel

¶25 In addition to asserting that the circuit court erred in concluding on summary judgment that the Schmidts knew or should have known of their cause of action against Northern States in 1993, the Schmidts contend that Northern States should be estopped from relying on a statute of limitations defense. According to the Schmidts, estoppel should be invoked because Northern States withheld from them the results of a "critical" test it performed in September 1993, "the one and only test that identifies 'off-farm' sources—that is N[orthern States]—as being responsible for more than 1 mA of current." The Schmidts contend that the utility's failure to give them a copy of the report before they were able to obtain it during discovery constitutes "inequitable conduct" justifying application of the doctrine of estoppel.

¶26 Given our conclusion that the issue of when the six-year statute of limitations began to run must be decided by a fact finder, any discussion of reasons why Northern States might be estopped from asserting the statute is premature. If a fact finder determines that the Schmidts first knew or should have known of their claim against Northern States within six years of filing their action, then WIS. STAT. § 893.52 does not bar the present action and the estoppel issue becomes irrelevant. If, however, the fact finder determines the discovery issue in favor of Northern States, the circuit court might then be asked to exercise its discretion in applying the equitable doctrine of estoppel to relieve the Schmidts from the consequences of the time bar. In the mean time, if Northern States withheld critical information from the Schmidts regarding its testing on the Schmidt farm until after this lawsuit was commenced, that fact may be considered by the fact-finder, along with all other relevant circumstances, in determining

when the Schmidts knew or should have known of the existence of stray voltage on their farm that was attributable to Northern States.

The Filed Rate Doctrine[10]

¶27 Northern States maintains that, even if the circuit court erred in granting summary judgment on the discovery/statute of limitations issue, the court correctly concluded on reconsideration that the utility is shielded from liability to the Schmidts on the present facts by the "filed rate doctrine." As we explained in ***Servais v. Kraft Foods, Inc***., 2001 WI App 165, 246 Wis. 2d 920, 631 N.W.2d 629, the Wisconsin Supreme Court has "adopted" the filed rate doctrine, which developed in the federal courts as a means of addressing the "dual concerns of avoiding discriminatory rates and of avoiding judicial rate-making." ***Id***., ¶¶12, 16. The doctrine, as recognized in Wisconsin, precludes a private cause of action against another for engaging in discriminatory pricing when the prices or rates in question have been established or approved by a state or federal regulatory body. *See* ***id***., ¶¶14, 16.

¶28 Northern States claims that the doctrine applies in this case because, as part of its "tariff" filed with the Wisconsin Public Service Commission (PSC), it has set forth the criteria and rules under which it will perform on-farm testing for stray voltage and undertake corrective action if necessary. According to Northern States, the existence of this "stray voltage tariff" immunizes it from private

[10] As with their arguments on the statute-of-limitations/discovery issue, the parties' arguments in this appeal track those made by the parties in ***Heeg*** (see footnote 4). Northern States' contention that the Schmidts' claim is barred by the filed rate doctrine is purely one of law, and the differences in the factual backgrounds of the two cases are immaterial to our resolution of the issue. Accordingly, our discussion of the filed rate doctrine defense is identical to that in ***Heeg***.

damage claims for stray voltages or currents that fall below the PSC's "level of concern," as incorporated in the tariff.[11] Specifically, the utility contends that the Schmidts are seeking "a judicial remedy that provides them with a higher level of service than authorized" in its tariff because the Schmidts cannot show that Northern States caused currents above the identified "level of concern" at cow contact points on the Schmidt farm "at any given time utilizing the testing procedure in [its] tariff."

¶29 The supreme court held in ***Hoffmann v. Wisconsin Elec. Power Co.***, 2003 WI 64, 262 Wis. 2d 264, 664 N.W.2d 55, that the absence of current measured to be above the PSC-established "level of concern" does *not* preclude a farmer from recovering damages from a utility for stray voltage injuries attributable to the utility. ***Id***., ¶14. Northern States would have us distinguish ***Hoffmann*** because, unlike the utility in ***Hoffmann***, it claims that it

> does not maintain that the PSC[] standards or the PSC[] level of concern has the force and effect of law such that N[orthern States] is not liable if it complied with the PSC[] standards. Rather, it is the fact that the level of concern is incorporated in N[orthern States]' tariff that bars the Schmidts from recovery in this case.

¶30 We reject the attempted distinction. Rather, we conclude that the fact that Northern States has filed a tariff that includes provisions describing its policies and procedures for responding to customer complaints regarding stray voltage does not allow the utility to circumvent the ***Hoffmann*** holding. That is, notwithstanding its stray voltage tariff, and despite a lack of proof that cow contact

[11] "'[L]evel of concern' has been defined by the PSC [Public Service Commission] as the level above which corrective or mitigative action should be taken if production or behavioral problems exist, which is one milliampere in the 'cow contact' areas." ***Hoffmann v. Wisconsin Elec. Power Co.***, 2003 WI 64, ¶5, 262 Wis. 2d 264, 664 N.W.2d 55.

currents on the Schmidts' farm exceeded the PSC's designated "level of concern," Northern States is not immunized from all liability for stray voltage injury it may have caused the Schmidts.

¶31 The filed rate doctrine applies when a plaintiff seeks money damages based on allegedly discriminatory industry practices that cause there to be a difference between an allegedly "fair" price or rate and that established or approved by a regulatory agency. For example, ***Servais*** involved a suit by sellers of milk who claimed that the price of milk set under the U.S. Department of Agriculture's regional "milk orders" was too low because of the manipulative purchasing practices of several major milk buyers. ***Servais***, 246 Wis. 2d 920, ¶2. Similarly, the claim in ***Prentice v. Title Ins. Co. of Minnesota***, 176 Wis. 2d 714, 500 N.W.2d 658 (1993), was that certain title insurers were fixing prices by participating in a statewide "rate service organization." ***Id***. at 719. The supreme court explained in ***Prentice*** that the legislative scheme for regulating insurance rates and the availability of a "regulatory remedy bars a *private rate-related suit* for damages." ***Id***. at 726-27 (emphasis added). The present litigation, however, involves a property-damage claim sounding in tort; it is not a "rate-related suit for damages."

¶32 Northern States also argues that "[i]t is well established that a limitation of liability contained in a tariff is an essential part of the rate at which service is furnished." That may well be true, but nothing in Northern States' tariff dealing with stray voltage even so much as suggests a "limitation of liability" in return for the utility's compliance with the tariff provisions. Moreover, we question whether, if Northern States had attempted to include exculpatory language in its stray voltage tariff, such a provision would have met with the

PSC's approval. The supreme court has described the applicable utility regulatory statutes and their legislative history as follows:

> Nowhere in the language of chapter 196 of the Wisconsin Statutes is common-law negligence, with respect to stray voltage, changed or altered. In fact, such a change has been specifically considered and was rejected. In Wisconsin's initial budget bill for 2001-2002, a provision was included that would have changed the standards for civil liability with respect to stray voltage. The bill proposed creating a statute, providing that "[a] public utility is immune from liability for any damage caused by or resulting from stray voltage contributed by the public utility if that stray voltage is below the level of concern established by the public service commission …." 2001 S.B. 55, § 3866. However, after severe public criticism, the provision was withdrawn and was never passed into law.

Hoffmann, 262 Wis. 2d 264, ¶13.

¶33 In sum, we are simply not persuaded that the filed rate doctrine alters the conclusions the supreme court reached in ***Hoffmann***. We thus conclude that the filed rate doctrine does not bar the Schmidts' claims against Northern States for damages resulting from stray voltage attributable to the utility.

CONCLUSION

¶34 The evidentiary submissions on summary judgment permit differing reasonable inferences regarding whether the Schmidts exercised reasonable diligence in attempting to ascertain the nature and source of their injury and regarding when they reasonably should have discovered their claim against Northern States Power Company. Their action seeking remedies in tort against Northern States is thus not barred as a matter of law by WIS. STAT. § 893.52, and neither is it barred by the filed rate doctrine. Accordingly, we reverse the appealed

judgment and remand the Schmidts' claims to the circuit court for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.